NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

TERRY L. FLEMING, SR.,	
Cross-complainant and Appellant,	G051251
v.	(Super. Ct. No. 30-2011-00487736)
J. VICTOR CONSTRUCTION PROFIT SHARING PENSION PLAN,	O P I N I O N
Crross-defendant and Respondent.	

Appeal from a postjudgment order of the Superior Court of Orange County, Kimberly Knill, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Law Office of Paul D. Bojic and Paul D. Bojic for Cross-complainant and Appellant.

Stuart Kane, Donald J. Hamman and Eve A. Brackmann for Cross-defendant and Respondent.

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The J. Victor Construction Profit Sharing Pension Plan (the Plan) demurred to Terry L. Fleming, Sr.'s third amended cross-complaint against the Plan and other cross-defendants. After the court sustained the demurrer without leave to amend, the Plan moved for an award of attorney fees against Fleming Sr. The Plan based its motion on three alternative grounds, viz., the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1001 et seq.), Civil Code section 1717, and Corporations Code section 17709.02 (governing derivative suits). The court awarded the Plan around $44,500 in attorney fees and costs. Fleming Sr. appeals from the court's attorney fee order. For the reasons discussed below, we reverse the court's order.

FACTUAL AND PROCEDURAL HISTORY

Prior to Fleming Sr.'s filing of the cross-complaint whose amendments are at issue here, Terry L. Fleming, Jr. (Fleming Sr.'s son) filed a complaint which gave rise to the subsequent pleadings in this case.[1]

On December 11, 2013, Fleming Sr. (individually and as trustee of the Terry Lee Fleming Family Trust) filed a cross-complaint against J. Victor and Linda Peloquin (the Peloquins), Capital Source Partners (CSP), and J. Victor Construction, Inc. (JVC). The next day, i.e., on December 12, 2013, Fleming Sr. filed an amended cross-

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[1] Litigation in this case began in June 2011, when Fleming Jr. sued Jean Victor Peloquin concerning an alleged contractual buy-out option whereby Peloquin was obligated to purchase Fleming Jr.'s membership interest in Havasu Lakeshore Investments, LLC (Havasu) upon Fleming Jr.'s exercise of the option.

In August 2011, Peloquin, Havasu, Capital Source Partners, and J. Victor Construction, Inc. filed a cross-complaint against Fleming Sr. (individually and as trustee of a trust), Fleming Jr., and Havasu Landing LLC.

In September 2012, Fleming Jr. sued Havasu, Capital Source Partners, J. Victor Construction, Inc., and Peloquin.

complaint (FACC), which sued the Plan *and* the prior cross-defendants (collectively, the Peloquins, JVC, CSP, and the Plan are referred to herein as Cross-defendants). On April 29, 2014, Fleming Sr. filed a second amended cross-complaint (SACC) against Cross-defendants. On July 23, 2014, Fleming Sr. filed a third amended cross-complaint (TACC) against Cross-defendants. Fleming Sr.'s cross-complaint and its amendments did *not* name Havasu as a cross-defendant.

We summarize below the causes of action *against the Plan* in the FACC, the SACC, and the TACC. We summarize allegations from all three pleadings because doing so gives the reader a more complete description of the litigation surrounding Fleming Sr.'s cross-complaint, all of which preceded the attorney fee motion at issue. In some respects, reading only the allegations of the last pleading, the TACC, is like joining a conversation long after it started without restatement of what had already been said.

The FACC's allegations against the Plan

1. General Allegations

In relevant part, the FACC contained the following general allegations. At all times mentioned in the FACC, the Peloquins were the sole owners, had full control of, and were the alter-egos of JVC, CSP, and the Plan. The Plan is a business entity of unknown form.

Havasu was formed to own and develop 80 acres into a 320-lot mobilehome park (the Property). CSP was Havasu's managing member. The FACC attached as an exhibit and incorporated by reference Havasu's operating agreement. In November 2004, Fleming Sr. became an 8.3 percent owner/member of Havasu.

In January 2005, Downey Savings loaned $8.4 million (the Downey loan) to Havasu "to be solely used to develop the Property." The Peloquins and JVC personally guaranteed the loan.

Unbeknownst to Fleming Sr., when Havasu received its borrowed funds from the Downey loan and $3 million in investor money (Investor Funds), Cross-defendants began using the money for their own personal use. This resulted in insufficient funds to complete the mobilehome park.

In April 2007, Havasu modified the Downey loan to increase the amount to almost $12 million. In February 2009, Havasu defaulted on the Downey loan.

In order for the Peloquins and JVC to be relieved as guarantors of the Downey loan, J. Victor Peloquin asked Fleming Sr. if he was interested in buying the loan from U.S. Bank (Downey's successor). Fleming Sr. purchased the Downey loan and continued the foreclosure process on the Property. Fleming Sr. bought the Property at the trustee sale, then transferred title to Havasu Landing, LLC.

Between the funding date of the Downey loan and the date of the trustee sale of the Property, the Peloquins and CSP distributed money from the Downey loan and Investor Funds to the Plan who deposited it into the Plan's bank accounts.

On numerous occasions, Fleming Sr. demanded that Cross-defendants return the $5 million they converted for their own personal use, but they refused.

2. Conversion claim against the Plan

Fleming Sr.'s fifth cause of action (conversion) was the only one alleged against the Plan, and included the following additional allegations. Havasu's managing member, CSP, breached its duties by distributing over $5 million from the Downey loan and Investor Funds to Cross-defendants. Cross-defendants intentionally converted these funds, which belonged to Fleming Sr. as an owner of Havasu. Cross-defendants exercised control over these funds which belonged to Havasu and Fleming Sr. As a proximate result of Cross-defendants' control over Fleming Sr.'s interest in Havasu, Fleming Sr., as a Havasu owner, had suffered $1 million in damages. Cross-defendants' acts were intentional and malicious, justifying imposition of punitive damages against them. Fleming Sr. prayed for damages of $1 million (or according to proof) plus prejudgment interest and reasonable attorney fees and costs.

The SACC's allegations against the Plan

The SACC's general allegations were similar to those in the FACC with the following additions or revisions. In August 2004, Fleming Sr. made a $625,000 investment to Cross-defendants based on their representation the money would be used only to develop the Property. On numerous occasions, Fleming Sr. demanded that Cross-defendants return the $625,000 they converted for their own personal use, but they refused.

The SACC set forth four claims against Cross-defendants — breach of fiduciary duty (first cause of action), fraud and deceit (second cause of action), negligent misrepresentation (third cause of action), and conversion (fourth cause of action). These claims included the following allegations beyond those stated in the SACC's general allegations.

The breach of fiduciary duty and conversion claims alleged Cross-defendants owed Fleming Sr. a fiduciary duty to ensure his $625,000 investment in Havasu was used solely to develop the Property. As a result of Cross-defendants' breach of their fiduciary duties and conversion and exercise of control over his $625,000 investment, Fleming Sr. suffered damage in the amount of $625,000.

The fraud and deceit and negligent misrepresentation claims alleged Cross-defendants perpetrated a systematic deception and fraud on Fleming Sr. The fraud and deceit claim alleged Cross-defendants intentionally deceived Fleming Sr. by making misrepresentations that suppressed the truth. The negligent misrepresentation claim alleged Cross-defendants made representations to induce him to invest money with no reasonable grounds for believing them to be true.

Fleming Sr. prayed for damages of $625,000 (or according to proof) plus prejudgment interest and reasonable attorney fees and costs.

The TACC's allegations against the Plan

The TACC's general allegations were similar to those in the SACC with the following additions. It was a condition of the Downey loan that the Peloquins and Havasu use the $1.25 million from Fleming Sr. and Fleming Jr. to develop the Property into a 320-lot mobile home park. In February 2006, the Peloquins, JVC, and CSP issued a capital call to Fleming Sr. for an additional $46,295, which Fleming Sr. paid. On May 23, 2006, the Peloquins, CSP, and JVC directed Havasu to wire $333,000 to the Plan, although there was no viable reason for the Plan's receipt of that sum from Havasu.

The TACC contained two claims against Cross-defendants — fraud and deceit (first cause of action) and negligent misrepresentation (second cause of action). Those claims included the following allegations beyond those stated in the TACC's general allegations. Cross-defendants perpetrated a systematic deception and fraud on Fleming Sr. Fleming Sr. invested $671,295 in Havasu based on Cross-defendants' representations the money would be used solely to develop the Property. The fraud and deceit claim alleged Cross-defendants intentionally deceived Fleming Sr. by making misrepresentations that suppressed the truth. The negligent misrepresentation claim alleged Cross-defendants made representations to induce him to invest money with no reasonable grounds for believing them to be true.

Fleming Sr. prayed for damages of $671,295 (or according to proof) plus prejudgment interest and reasonable attorney fees and costs, as well as punitive damages.

The Plan's motion for attorney fees

After the court sustained the Plan's demurrer to the TACC without leave to amend and entered judgment thereon, the Plan moved for an award of $44,451 in attorney fees and costs against Fleming Sr. The Plan argued it was entitled to attorney fees under ERISA, Civil Code section 1717 (based on an amendment to Havasu's operating agreement), and Corporations Code section 17709.02 et seq.

As to ERISA, the Plan contended attorney fees "are recoverable by the prevailing party in an action under ERISA, which this case was." It asserted that section 1132(g)(1) of title 29 of the United States Code[2] states, "'In any action under this subchapter [other than actions on behalf of the plan under 29 U.S.C. § 1145, ERISA § 515 dealing with employer contributions to a multi-employer plan], the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.'"[3]

As to Civil Code section 1717, the Plan alleged Fleming Sr. became a party to Havasu's operating agreement when the parties executed the agreement for admission of members and transfer of membership interest in Havasu and amendment to operating agreement (the Admission Agreement). The Plan contended that Havasu's "Operating Agreement is the foundation of all claims asserted by Fleming" and that the operating agreement was amended by a contract containing a clause providing for attorney fees to the prevailing party in an action brought by a contractual party to enforce the terms of the contract or to declare rights under it.

As to Corporations Code section 17709.02, the Plan contended the statute allows a limited liability company in a derivative action, and its manager, to move for a court order requiring the plaintiff to file a bond of up to $50,000 as security for reasonable costs, including attorney fees incurred for its defense or for indemnification.

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[2] All references to section 1132 are to section 1132 of title 29 of the United States Code.

[3] As discussed in more detail below, the respondent's brief quotes the statute in a misleading way, using the Plan's bracketed language to replace the statute's actual specification that it applies only to actions "brought by a participant, beneficiary, or fiduciary." (29 U.S.C. § 1132(g)(1).)

The Plan asserted, "Here, plaintiff alleged that the Peloquins were alter egos of the manager and [the Plan], so fees are recoverable as if [the Plan] were itself the manager."

Fleming Sr.'s opposition to the Plan's motion for attorney fees

Fleming Sr. opposed the Plan's motion for attorney fees. He noted the Plan was *not* a member of, and had never had an ownership interest in, Havasu. He alleged that without his knowledge, the Plan embezzled $333,000 from Havasu.

As to ERISA, Fleming Sr. pointed out that the Plan's motion had intentionally omitted the phrase of section 1132(g) permitting attorney fees to a party in an ERISA action brought by *a participant, beneficiary, or fiduciary*. Fleming Sr. asserted he is *not* a participant, beneficiary, or fiduciary of the Plan. He further noted the Plan had failed to attach evidence of its status as an ERISA plan. He also argued his first cause of action for fraud and deceit and second cause of action for negligent misrepresentation were *not* ERISA claims.

As to Corporations Code section 17709.02, Fleming Sr. asserted the Plan and its counsel had "known since July 3, 2014 that the causes of action filed by FLEMING SR were not derivative and that no bond was necessary." Fleming Sr. quoted the relevant portion of the court's July 3, 2014 ruling.

As to Civil Code section 1717, Fleming Sr. reiterated that the Plan was not a member of, and had never had an ownership interest in, Havasu, and that Havasu's operating agreement did *not* contain an attorney fees clause.

The court's ruling on the Plan's motion for attorney fees

In a minute order, the court stated, "[The Plan's] Motion for an award of Attorneys' Fees and Costs is **granted**. Cross-Defendant is the prevailing party, and judgment [has] been entered in its favor on October 27, 2014. Cross-Complainant, Terry

L. Fleming Sr., is ordered to pay Cross-Defendant[, the Plan], the sum of $44,551.40 as reasonable attorney's fees and costs."

DISCUSSION

In its respondent's brief, the Plan argues Fleming Sr. did not contest below the amount of attorney fees requested in the Plan's motion nor did he "seek to apportion fees among the causes of action in the three amended cross-complaints that he filed, so any one basis for any award of fees means that the order awarding fees and costs of $44,551.40 must be affirmed."

On all three independent bases — i.e., ERISA, derivative claim, or contract clause — our standard of review is de novo, since the issue before us is whether the criteria for an award of attorney fees has been satisfied, which "'amounts to statutory construction and a question of law.'" (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.)

ERISA does not support the court's attorney fee award

Fleming Sr. argues his claims in the TACC did not seek relief under ERISA and did not arise from his being a participant, beneficiary, or fiduciary of the Plan.

The Supreme Court, citing section 1132(g)(1), has stated, "In most lawsuits *seeking relief under* . . . *ERISA* . . . , 'a reasonable attorney's fee and costs' are available 'to either party' at the court's 'discretion.'" (*Hardt v. Reliance Standard Life Ins. Co.* (2010) 560 U.S. 242, 244, italics added.) Section 1132(g)(1) provides: "In any action under this title (other than an action described in paragraph (2)) *by a participant, beneficiary, or fiduciary*, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." (Italics added.) Thus, section 1132(g)(1), by its terms, applies to actions brought by a participant, beneficiary, or fiduciary of an ERISA plan.

Fleming Sr.'s FACC, SACC, and TACC contained no claims concerning employee benefit rights or in any other way seeking relief under ERISA. Furthermore, Fleming Sr. denies being a participant or beneficiary of the Plan, and the Plan does not assert otherwise.[4] For either one of these two independent reasons, section 1132(g)(1) does not apply here.

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[4] The Plan argues that, "[t]o the extent that [Fleming Sr.] attempted to sue a pension plan, he had to claim to have been [a participant, beneficiary, or fiduciary of the Plan]. Having done so, he cannot now deny his status to avoid what he sought to prove." The Plan's argument appears to be that an ERISA plan is immune from suit by a non-related party for a non ERISA claim. Possibly as support for this assertion, the Plan cites section 1132(a), which limits who can bring a civil action *under ERISA*: "(a) Persons empowered to bring a civil action[.] [¶] A civil action may be brought— [¶] (1) by a participant or beneficiary— [¶] (A) for the relief provided for in subsection (c) of this section [governing penalties against, or personal liability of, a plan administrator], or [¶] (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]" (*Ibid.*) But Fleming Sr. did not bring an action under ERISA.

The Plan also relies on *Oregon Teamster Employers Trust v. Hillsboro Garbage Disposal, Inc.* (9th Cir. 2015) 800 F.3d 1151, in which the Ninth Circuit affirmed the district court's grant of summary judgment against the plaintiff ERISA plan, inter alia, because the plan's breach of contract claims were preempted by ERISA. (*Id.* at p. 1154.) The Ninth Circuit explained: "Under 29 U.S.C. § 1144(a), ERISA's provisions 'supersede any and all State laws insofar as they . . . relate to'" an ERISA plan. (*Id.* at p. 1155.) "A common law claim 'relates to' an ERISA plan 'if it has a connection with or reference to such a plan.' [Citations.] In determining whether a common law claim has 'reference to' an ERISA plan, 'the focus is whether the claim is premised on the existence of an ERISA plan, and whether the existence of the plan is essential to the claim's survival.'" (*Ibid.*) "In evaluating whether a claim has a 'connection with' an ERISA plan, we use a 'relationship test' that focuses [on] whether the 'claim bears on an ERISA-regulated relationship, *e.g.*, the relationship between plan and plan member, between plan and employer, between employer and employee.'"(*Id.* at p. 1156.) Here, none of Fleming Sr.'s claims focused on the Plan's status as an ERISA plan or concerned an ERISA-regulated relationship.

Finally, the Plan cites *Credit Managers Assn. v. Kennesaw Life & Accident Ins. Co.* (9th Cir. 1994) 25 F.3d 743, in which the Ninth Circuit stated: "Pursuant to 29

Civil Code section 1717 does not support the court's attorney fee award

Fleming Sr. asserts that he (individually, as opposed to as trustee of a trust) and the Plan were *not* parties to Havasu's operating agreement or to the Admission Agreement.[5] He further contends he brought no claims against the Plan "to enforce the terms" of the Admission Agreement or "to declare rights" thereunder, as required for an award of attorney fees under the Admission Agreement. He also argues Civil Code section 1717, subdivision (a) does not apply to tort claims.

The Plan counters that, although the Plan was not a party to the Admission Agreement, the "Plan was sued as the alter ego of CSP [and] JVC," both of whom signed the Admission Agreement. The Plan also relies on case law allowing attorney fees under Civil Code section 1717 for a nonsignatory to a contract who has been sued on the contract as though the nonsignatory were a party to the contract.

Civil Code section 1717, subdivision (a) provides in relevant part, "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the

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U.S.C. § 1132(g)(1), courts have discretion to award reasonable attorney's fees to either party in any action by an ERISA-plan participant, beneficiary, or fiduciary." (*Id.* at p. 747.) The court held that even though the plaintiff failed at trial to satisfy its burden of proving that an ERISA plan existed, the district court had properly awarded attorney fees to the defendant under section 1132(g)(1), because, during eight years of litigation, the plaintiff had "colorably maintained that it was a fiduciary of an ERISA plan . . . in a manner sufficient to withstand summary judgment." (*Id.* at p. 747.) Here, Fleming Sr. never maintained he was a participant, beneficiary, or fiduciary of the Plan.

[5] The Plan inaccurately states that Fleming Sr. raises for the first time on appeal the argument that the Plan was not a member of Havasu. In fact, Fleming Sr. made this exact argument several times in his opposition to the Plan's attorney fees motion.

On appeal Fleming Sr. does raise the argument he was a member of Havasu only in his capacity as trustee, not individually. But the relevant allegation in the TACC does not specify Fleming's status was as a trustee, although a revised exhibit to Havasu's Operating Agreement does reflect the Terry Fleming Family Trust (as opposed to Fleming Sr. individually) is a member of Havasu.

parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

An attorney fees clause in the Admission Agreement provides in relevant part: "If either party to this Agreement shall bring any action [or] counterclaim . . . for any relief against the other . . . to *enforce the terms hereof or to declare rights hereunder* . . . , the losing party shall pay to the prevailing party a reasonable sum for attorneys fees . . . ." (Italics added.) The terms of and rights under the Admission Agreement are quite limited: The Admission Agreement provides for the cancellation of the promissory notes to Fleming Sr. and Fleming Jr., their receipt of membership interests in Havasu (expressed in terms of units and percentage share), the revised membership interests of the other members of Havasu, the possibility of a mandatory contribution call, and an acknowledgment by Fleming Sr. and Fleming Jr. that they are acquiring their membership interests for their own account and knowing the interests are unregistered under federal securities law.

The Plan contends Havasu's operating agreement contains an attorney fees clause because it "was modified by the" Admission Agreement. In fact, despite the presence in the Admission Agreement of an initial paragraph 3, a different (and misplaced or misnumbered) paragraph 3 appears within paragraph 4 of the Admission Agreement and states, "The Operating Agreement is amended by this agreement and to the extent that there is a conflict between the Operating Agreement and this agreement this agreement shall prevail and control." Given the limited content of the Admission Agreement, it did *not* amend and supersede the operating agreement with respect to the rights and duties (fiduciary or otherwise) of the manager and other initial members of Havasu, other than their duty to pay a mandatory contribution upon call and their right to a specified membership interest, but it did make Fleming Sr. and Fleming Jr. members of Havasu and thus parties to the operating agreement. The issue, however, is whether the

Admission Agreement's extension of the right to attorney fees in actions to enforce the terms of or to declare rights under the Admission Agreement extends to actions to enforce the terms of and rights under the operating agreement.

But we need not decide that issue. Even if Fleming Sr.'s tort claims did seek to enforce the terms of or declare rights under the Admission Agreement or the operating agreement,[6] an independent basis exists for reversing the court's attorney fee award under Civil Code section 1717. The Plan was not a signatory to the Admission Agreement or to Havasu's operating agreement. The Plan argues it may recover attorney fees under the Admission Agreement even though it was not a signatory, asserting that Fleming Sr. alleged the Plan was the alter ego of JVC and CSP, who are signatories to the contract. In fact, the Plan's assertion is inaccurate. Fleming Sr. alleged *the Peloquins* were the alter egos of CSP, JVC, and the Plan.[7] Fleming Sr. *never* alleged that *the Plan* was the alter ego of JVC and CSP. Had Fleming Sr. prevailed against the Plan, even assuming his action had been construed as an action to enforce the terms of or declare rights under the Admission Agreement or operating agreement, he would not have been entitled to an award of attorney fees against the Plan. There is simply no basis on this

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[6] Fleming Sr. sued the Plan for allegedly intentionally converting funds belonging to Havasu and him (FACC), including his investment in Havasu (SACC). He further sued the Plan for allegedly making fraudulent or negligently false misrepresentations. In the SACC, he alleged Cross-defendants breached their fiduciary duty to ensure his $625,000 investment was used solely to develop the Property. The court sustained without leave to amend Cross-defendants' demurrer to Fleming Sr.'s breach of fiduciary duty claim, stating the alleged duty was based on the promissory note and deed of trust evidencing Fleming Sr.'s $625,000 loan which he later converted into an investment by exercising an option contained in the note.

[7] Fleming Sr. did *not* allege the Plan is "'so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of'" CSP and/or JVC. (*McLoughlin v. L. Bloom Sons Co., Inc.* (1962) 206 Cal.App.2d 848, 851-852.) The Plan proffers no legal authority or reasoned argument to support its interpretation of Fleming Sr.'s actual allegation. (Cal. Rules of Court, rule 8.204(a)(1)(B).)

record to conclude the Plan would have been obligated under the attorney fee clause of the Admission Agreement had Fleming Sr. prevailed. Accordingly, the Plan likewise is unable to claim an entitlement to attorney fees under either the Admission Agreement or the operating agreement.

The cases cited by the Plan in support of its claim for attorney fees are inapt, because each of them are founded upon the principle announced in *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124 (*Reynolds*): "Had plaintiff prevailed on its cause of action claiming defendants were in fact the alter egos of the corporation [citation], defendants would have been liable on the notes. Since they would have been liable for attorney's fees pursuant to the fees provision had plaintiff prevailed, they may recover attorney's fees pursuant to [Civil Code] section 1717 now that they have prevailed." (*Id.* at p. 129.) Similarly, in *Pueblo Radiology Medical Group, Inc.* (2008) 163 Cal.App.4th 826 (*Pueblo*), the appellate court affirmed the trial court's award of attorney fees to individual nonsignatory defendants alleged to be the alter egos of a bankrupt corporation. (*Id.* at pp. 827-828.) Here, Fleming Sr. did *not* claim that the Plan was the alter ego of Havasu or any of its members, and thus Fleming Sr. could not have held the Plan liable for attorney fees.

In *CB Richard Ellis, Inc. v. Terra Nostra Consultants* (2014) 230 Cal.App.4th 405 (*CBRE*), we applied *Reynolds'* interpretation of Civil Code section 1717 to authorize an attorney fees award to nonsignatory defendants who bore statutory liability for claims against a dissolved limited liability company (the LLC). (*Id.* at pp. 416-417.) Because the defendants were statutorily liable for claims against the LLC, the defendants "were deemed to be statutory parties to the contract with" the plaintiff. (*Id.* at p. 416.) We likened the case to *Reynolds*, and explained, "This is not an alter ego case. But the statutory remedy provided by former [Corporations Code section] 17355 was similar to alter ego doctrine in that it prohibited investors from inequitably leaving creditors high and dry with an empty judgment against an insolvent entity." (*Id.* at p.

417.) Here, there is no statute assigning statutory liability to the Plan for the obligations of Havasu or any of its members.

Thus, each of these cases involved nonsignatories alleged to be liable for the debts of an insolvent corporation which was a signatory to a contract containing an attorney fees clause.[8] In *Reynolds* and *Pueblo*, if the nonsignatory had been found to be the alter ego of the insolvent signatory corporation, the nonsignatory would stand in the corporation's shoes for purposes of the contract and be deemed a contractual party subject to the attorney clause. The opponent would have been "clearly" entitled to attorney fees for prevailing on the contract. (*Reynolds*, *supra*, 25 Cal.3d at p. 129.) Conversely, where the opponent's alter ego theory is rejected, the nonsignatory is entitled to attorney fees based on the reciprocal nature of Civil Code section 1717, which the Legislature enacted to "avoid the perceived unfairness of one-sided attorneys fee provisions" (*International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1182). *CBRE* followed the same rationale with respect to the statutory liablity of nonsignatory members of a dissolved limited liability company. Here, the Plan was not alleged to be an alter ego, nor is there any statutory basis to make it responsible for claims against Havasu or its members.

Corporations Code section 17709.02 does not support the court's attorney fee award

Havasu is a California limited liability company. Corporations Code section 17709.02 applies to actions "instituted or maintained in right of [a] limited liability company by any member of the limited liability company," i.e., derivative suits brought by members of limited liability companies. The statute allows the limited

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[8] The Plan also relies on *First Security Bank of Cal. v. Paquet* (2002) 98 Cal.App.4th 468, but although that case affirmed an award of attorney fees to individual defendants sued on the theory they were alter egos of a corporation (*id*. at pp. 471-472), the issue addressed was whether the award was premature since another action remained unresolved (*id*. at p. 475).

liability company or its manager to move the court for an order requiring the plaintiff to furnish security on grounds that prosecution of the cause of action is unlikely to benefit the limited liability company or its members, or the moving manager did not participate in the transaction complained of. (*Id*., subd. (b).) "If a motion is filed pursuant to subdivision (b), no pleadings need be filed by the limited liability company or any other defendant and the prosecution of the action shall be stayed until 10 days after the motion has been disposed of." (*Id*., subd. (e).) If the court determines the moving party has established a probability in support of a ground on which the motion is based, the court shall fix the security to be furnished by the plaintiff for reasonable expenses that may be incurred by the moving party and the limited liability company. If the plaintiff fails to furnish the security within a reasonable time fixed by the court, the action will be dismissed as to that defendant." (*Id*., subd. (c)(2).) A court's ruling on a Corporations Code section 17709.02, subdivision (b) "motion shall not be a determination of any issue in the action or of the merits of the action." (*Ibid.*)

The Plan argues that Corporations Code section 17709.02 authorized Havasu's manager to move for a court order requiring Fleming Sr. to post a bond of up to $50,000 as security for defense and indemnification expenses. It asserts (inaccurately) that Fleming Sr. alleged Havasu's manager was an alter ego of the Plan, "so fees are recoverable as if [the] Plan were itself the manager."[9] Fleming Sr. assert his claims against the Plan were not derivative claims brought on behalf of Havasu, but, rather, claims brought on his own behalf.

The Plan contends some orders of Judge Thierry Patrick Colaw "acknowledged" the claims were derivative. As to the FACC, a February 28, 2014 minute order granted the motion of Havasu and its manager under Corporations Code section 800, subdivision (c)(1) because they had established Fleming Sr. had "filed a

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[9] Fleming Sr. alleged *the Peloquins* were the alter egos of CSP, JVC, and the Plan.

derivative claim."[10] The order did not identify the derivative claim. The order required Fleming Sr. to post a $50,000 bond within 30 days. Two months later, an April 22, 2014 minute order sustained with leave to amend Cross-defendants' demurrer to the FACC's first through fourth causes of action alleged against the Peloquins, JVC, and CSP only. (The FACC alleged only the fifth cause of action, for conversion, against the Plan.) The April 22, 2014 minute order set, for May 30, 2014, an order to show cause concerning dismissal for failure to post a bond pursuant to the February 28, 2014 minute order. The record does not reflect the outcome of that order to show cause.

As to the SACC, a July 3, 2014 minute order sustained with leave to amend Cross-defendants' demurrer to the fraud and negligent misrepresentation claims, stating, inter alia, that these claims alleged wrongdoing to Fleming Sr., individually, and not to Havasu, and were *not* shareholder derivative claims. The minute order sustained without leave to amend the breach of fiduciary duty and conversion claims, stating they were derivative claims and the court lacked jurisdiction to adjudicate them in the absence of the indispensable party, Havasu.

As to the TACC, Judge Colaw, in sustaining without leave to amend the Plan's demurrer to the TACC, stated, "Fleming Sr. has already acknowledged that he is not bringing any derivative claims because he has refused to post a bond. However, even if he were attempting to bring a derivative claim, Fleming Sr. has failed to plead with particularity his efforts to secure from the board of directors such action or specific facts showing why such a demand would be futile. [Citations.] In addition, [Havasu] is an indispensable party to this action; the court lacks jurisdiction to adjudicate the derivative claims in its absence."

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[10] Corporations Code section 800 applies to shareholder derivative suits.

Based on the foregoing, it is unclear whether Fleming Sr. asserted derivative claims against Havasu in the FACC, SACC, or TACC. He did *not* name Havasu as a party. “When a derivative suit is brought to litigate the rights of the corporation, the corporation is an indispensable party and must be joined as a nominal defendant.” (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108.) He prayed for his own individual recovery, not for any recovery for Havasu. “When a derivative action is successful, the corporation is the only party that benefits from any recovery; the shareholders derive no benefit ‘“except the indirect benefit resulting from a realization upon the corporation’s assets.”’” (*Ibid*.) His refusal to post a bond demonstrated he did not seek a recovery benefitting only Havasu.

In any case, Corporations Code section 17709.02 is not a statute that authorizes attorney fees. (Code Civ. Proc., § 1033.5, subd. (a)(10) [attorney fees included in costs when authorized by contract, statute, or law].) It is not, for example, a statute like Corporations Code section 17713.06, which authorizes a court to award attorney fees in an action for the failure of a manager or member of a limited liability company to comply with the requirement to file a document. (Corp. Code, §§ 17713.06, subd. (d), 17701.02, subds. (n), (p).) Instead, Corporations Code section 17709.02 authorizes a court to (1) order a plaintiff in a derivative action to furnish security to cover any attorney fees which may subsequently be awarded and (2) dismiss the action if the plaintiff fails to post such security. The evident intent of the statute is to relieve a limited liability company of the necessity of incurring attorney fees in the event a derivative action if filed, unless and until the plaintiff posts court-ordered security to cover any attorney fees that may *subsequently be awarded*.

DISPOSITION

The court's postjudgment order granting the Plan's motion for attorney fees is reversed. Fleming Sr. is entitled to costs on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.